

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

In Re: Bair Hugger Forced Air
Warming Devices Products
Liability Litigation

)
) File No. 15-MD-2666
) (JNE/FLN)
)
) April 29, 2016
) Minneapolis, Minnesota
) Courtroom 12W
) 10:00 a.m.
)
)
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BEFORE THE HONORABLE JOAN N. ERICKSEN
UNITED STATES DISTRICT COURT JUDGE

And THE HONORABLE FRANKLIN D. NOEL
UNITED STATES MAGISTRATE JUDGE

And THE HONORABLE WILLIAM H. LEARY III
RAMSEY COUNTY JUDGE

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8 Proceedings recorded by mechanical stenography;
9 transcript produced by computer.

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P R O C E E D I N G S

(10:06 a.m.)

THE COURT: Good morning, again. Please be seated. We have, I believe, the appearances of everyone in the courtroom, but we do not have the appearances of the telephone participants. So could we have those please?

(Inaudible speaker.)

THE COURT: Could you please start over?
Technical difficulties here, so once again from the top.

MS. OLIVER: Alyson Oliver.

MS. BABB: Katie Babb.

MR. MARTIN: Richard Martin.

MS. JOCHUM: Julie Jochum.

MR. TADTMAN: Brian Tadtman.

THE COURT: Repeat, please. Repeat the last one please.

(Inaudible speaker).

THE COURT: Nope, didn't get it.

MR. HEALY: Steve Healy.

MR. CIRESI: It was Brian something.

THE COURT: Okay, is there a Brian someone who identified themselves?

MS. NEUFELD: Kaitlyn Neufeld.

MR. LEE: Dae Lee.

MR. MANN: John Mann.

1 MR. GORDON: John Mann, M-a-n-n. Did I hear
2 Annesley DeGaris?

3 (Inaudible speaker.)

4 MR. XENICK: Dean Xenick.

5 MR. ROGERS: Jimmy Rogers.

6 MS. THOMAS: Caroline Thomas.

7 MS. YOUNG: Laura Young.

8 THE COURT: Anyone else on the phone who has not
9 identified themselves?

10 All right. We'll get started then. We had a
11 number of submissions yesterday afternoon and that looks
12 great in terms of progress.

13 The agenda, the joint agenda begins with a
14 discussion of pretrial order number 4. And there was
15 discussion last time about deadlines, so you say here is
16 that you are basically not having any problems with those
17 deadlines, but that you might agree on some modest
18 refinements. That's how I read it.

19 MR. BLACKWELL: Your Honor, I think that's fair.
20 We just haven't really been able to have our discussion in
21 earnest about it, but we understand that the point was to
22 tweak it and not to completely overhaul it so.

23 THE COURT: Okay. So hearing nothing specific, we
24 will assume that the deadlines remain the same, but if you
25 come up with anything that's not workable, let us know.

1 MR. GORDON: Thank you, Your Honor.

2 THE COURT: Science day, as I indicated informally
3 when I came out here a few minutes ago, is set for May 19th,
4 and it's currently scheduled from 2 o'clock until 6 o'clock
5 p.m. I am able to start that hearing at noon, and I
6 understand that that would actually be preferable from the
7 point of view of counsel and the witnesses. So unless I
8 hear some objection right now, we'll get that moved to noon.

9 MR. GORDON: No objection, Your Honor. One
10 question if I may.

11 THE COURT: Sure.

12 MR. GORDON: So we talked about coming in early
13 for status conference, should we do that on science day?
14 And it might be problematic to have phone attendance at that
15 given the non-evidentiary basis of it, so I just question
16 whether we need to address that.

17 THE COURT: What about you phone people? All
18 right, hearing nothing, makes sense to me. Judge Noel?

19 MAGISTRATE NOEL: The only question I had was by
20 moving the start time from 2:00 to 12:00, are we moving the
21 end time from 6:00 to 4:00 or are we adding two hours to the
22 day?

23 MR. BLACKWELL: I think the answer is yes, Your
24 Honor. I think the intent is still to have it be within the
25 four-hour hash marks.

1 MR. GORDON: That was our understanding or
2 impression as well, Your Honor.

3 THE COURT: Right. This does give us a chance to
4 have a coffee break if we wanted.

5 MR. BLACKWELL: Could I just ask one other kind of
6 housekeeping question for clarification around science day?
7 I had a discussion with Mr. Gordon just about the format
8 process, and whether there would be opportunities for
9 rebuttal or sur-rebuttal or is that more adversarial than
10 the Courts anticipated?

11 MR. GORDON: Your Honor, for what it's worth, our
12 understanding from the Court's informal guidance last time,
13 although we're happy to discuss the process, was that each
14 side would have two hours to use as we deemed appropriate.

15 THE COURT: I think so. The words "rebuttal" and
16 "surrebuttal" sound adversarial to me, but if there's a
17 point that a witness makes that you feel in the interest of
18 the educational mission, should be addressed by someone, I
19 don't think we'll say no, that person can't answer that
20 point because that would be surrebuttal, and we're not doing
21 that. So as necessary, within the time allotted.

22 MR. BLACKWELL: Yes.

23 MR. GORDON: So to be clear, Your Honor, our
24 belief would be or our position would be that if we preserve
25 some period of time within the two hours, and believe we

1 have some type of response as you've indicated to certain
2 points, we'd have the opportunity to do that after the
3 defense presents.

4 MAGISTRATE NOEL: I have nothing to add other than
5 I just realized I have a conflict at noon, but that's okay.
6 I'll catch up.

7 THE COURT: What time is your conflict?

8 MAGISTRATE NOEL: One. It's a pro se project CLE
9 that I promised I would be at.

10 (Discussion off the record.

11 THE COURT: Maybe we should start at one.

12 MR. GORDON: We're fine with 1:00, Your Honor.

13 THE COURT: All right. We'll start it at 1:00 and
14 then you folks can come ahead of time and talk to me if you
15 want.

16 MAGISTRATE NOEL: My apologies.

17 THE COURT: All right. An update on the number
18 and status of cases that have been transferred.

19 MR. FLAHERTY: Thank you, Your Honor. Brendan
20 Flaherty for David Szerlag. 249 cases filed as of
21 yesterday, and we submitted to the Court an updated master
22 service list, which should be accurate.

23 COURT REPORTER: Please slow down and speak
24 louder.

25 THE COURT: Come on up to the podium. All the way

1 up.

2 MR. FLAHERTY: Okay, so 249 cases filed as of
3 yesterday, and we submitted to the Court via e-mail
4 yesterday an updated master service list, which should be
5 accurate. And as far as I know, that's the updated
6 information.

7 THE COURT: Okay. There were 242 -- do you know
8 if Margaret Weimer is in there twice? Would you check on
9 that? Look at 16-CV-796. And 16-CV-621. Those look very
10 similar. So Thomas Stephen, that would be 16-CV-804 and,
11 16-827, could you just verify that those aren't duplicate
12 cases?

13 MR. FLAHERTY: Absolutely. If it is, we will just
14 resubmit the corrected version.

15 THE COURT: Okay. Anything else?

16 MR. FLAHERTY: I don't think so, not unless
17 there's any questions from you, Your Honor.

18 THE COURT: Anything on the state court cases? We
19 haven't heard from any of the state judges other than our
20 own Judge Leary about science day.

21 MR. FLAHERTY: No, Your Honor, and as far as I
22 know, there's no real activity in any of those various
23 litigations at all, so.

24 THE COURT: It didn't look like it.

25 MR. GORDON: There has, Your Honor, if I might,

1 and defense may know more about this. There has been a
2 scheduling order entered in one of the cases, one of the
3 Texas cases, I believe.

4 MR. HULSE: Yeah, I can speak to it, Your Honor.
5 So we have reached agreement in one of the two Texas cases
6 in the scheduling order that lines up with the scheduling
7 order in this court, which is good. We had the Court in
8 Harris County sua sponte enter a scheduling order that would
9 have us going to trial in February of next year.

10 But we're going to work with the plaintiff's
11 counsel, who is the same ones we just reached the agreement
12 with in the other case to get that one lined up too because
13 they don't have any interest of getting ahead of this Court,
14 so I think it's all going to work out just fine.

15 THE COURT: Okay. And keep our liaison counsel
16 informed.

17 MR. HULSE: Indeed, Your Honor.

18 THE COURT: And that XARELTO, there's nothing for
19 us to do about that.

20 And, Judge Leary, your cases are following along.
21 You don't have any additional orders or requirements of the
22 counsel?

23 JUDGE LEARY: No, I don't. At some point, I would
24 like an opportunity to address with regards to the trial
25 that's coming up or rather the pretrial orders coming out of

1 State Court.

2 THE COURT: Is now a good time?

3 JUDGE LEARY: Well, if I can, thank you, Judge
4 Ericksen.

5 THE COURT: Sure, did you want to come up here?

6 JUDGE LEARY: No, no, that's okay. With regard to
7 the pretrial orders, there's reference in the agenda to
8 pretrial order number 4, as well as some additional pretrial
9 orders 5, 6 and 7. Have any of those orders, I know 5, 6
10 and 7 have not been adopted by the State Court or by myself.
11 How about pretrial order 4? Is that in place in the State
12 Court action?

13 MS. ZIMMERMAN: Not at this time, Your Honor.
14 Pretrial order number 4 is the pretrial order from Judge
15 Ericksen regarding the scheduling order, so, setting for the
16 science day and the different discovery deadlines.

17 JUDGE LEARY: I guess my comment or my question is
18 I would like to see to the extent that I can, have my
19 pretrial orders following the pretrial orders of Judge
20 Ericksen. And so what I would ask that liaison counsel
21 contact my chambers and provide me with proposed orders that
22 reflect orders that have already been adopted by Judge
23 Ericksen.

24 MR. BLACKWELL: We can make that happen this
25 coming week.

1 JUDGE LEARY: Okay, very good.

2 MR. GORDON: I apologize for interrupting, Your
3 Honor. I'm getting a text from one of our PSE members
4 saying that no one on the phone can hear anything any longer
5 at all, like they've been muted perhaps.

6 MAGISTRATE NOEL: I think it's from prior
7 experience, I think it's because nobody is speaking into a
8 microphone. Can you hear me?

9 MR. GORDON: Let's see their response. By the
10 way, Your Honor, it's Annesley DeGaris. You know him. So
11 I'm texting him now to see if he heard what you just said.

12 THE COURT: The proceedings of the Court have come
13 to a halt to receive a text message.

14 MR. GORDON: Well, modern technology. He
15 responded, Your Honor, and said, no, he did not hear -- he
16 is not hearing any of this.

17 MAGISTRATE NOEL: I guess it's not just the
18 microphone.

19 THE COURT: Well, privacy is on. I wonder if
20 that's it. How about now, Mr. DeGaris? You can un-mute
21 yourself and answer right loud using your words.

22 MR. DEGARIS: Yes, Your Honor. I've been texting
23 other people and they could not hear, but I now can hear
24 you.

25 THE COURT: All right.

1 MR. GORDON: Thank you, Your Honor. I'm sorry,
2 Judge Leary.

3 JUDGE LEARY: The follow-up questions is with
4 regard to the number of cases. I'm particularly interested
5 in the State Court cases. They seem to be fairly flat at
6 this time. There's been an mild increase in the MDL
7 litigation. Is there any trends that can be gathered from
8 those numbers in the relative flatness of those numbers as
9 to what we're looking for in the future?

10 MR. BLACKWELL: Let me look to the plaintiffs,
11 Your Honor. Of course, we hope so, but.

12 MR. GORDON: My impression has been quite some
13 time, Your Honor, I think we spoke to this last time, but
14 I'll defer to Genevieve, that most of the cases will likely
15 be filed in the MDL. I think it will continue to be
16 relatively flat in State Court, but I can't speak for
17 everyone so.

18 MS. ZIMMERMAN: Yes, Your Honor. And as I think
19 that we've represented the cases that we filed in Ramsey
20 County are on behalf of Ramsey County or Minnesota
21 residents, and so that's the forum that they have available
22 to them. I think that the filings in Ramsey County have
23 been relatively flat, and I think we're right around 50
24 cases or so.

25 With respect to what we expect both in Ramsey

1 County and the MDL, it's hard to know. I do know just
2 within the plaintiff's steering committee that has been
3 appointed by this Court, that we're certainly vetting and
4 trying to be very careful about the cases we file, but we
5 expect there to be well over a thousand cases probably by
6 the end of the summer.

7 JUDGE LEARY: Okay, very good. That's all I have
8 for now Judge Ericksen. Thank you.

9 THE COURT: Thank you. What an efficient -- that
10 makes me feel very vindicated in having put the two cases
11 together because if you hadn't been here, you would have had
12 to contact them, and there would be all kinds of
13 coordination. So that was good. I like that.

14 JUDGE LEARY: Yes, indeed.

15 THE COURT: All right. Overview of related state
16 proceedings, there's nothing more that we need to talk about
17 there, I don't think.

18 Okay. So isn't this April?

19 MR. GORDON: Yes, Your Honor.

20 MR. CIRESI: Not much longer, Your Honor.

21 MS. ZIMMERMAN: And perhaps Your Honor is
22 referring to our failure to provide to you the common
23 benefit order prior to arriving today because we are on
24 number 5.

25 THE COURT: This is in advance of the April 2016

1 status conference.

2 MR. GORDON: Mr. Gordon has something. He's got a
3 blank piece of paper that he's waiving.

4 MS. ZIMMERMAN: We actually do have the order
5 done, and we just wanted to read through it one more time
6 and submit it to the Court right after this.

7 THE COURT: Sure, okay. Great.

8 MAGISTRATE NOEL: It's the name of 57 communists
9 in the State Department.

10 THE COURT: Yeah, right. You, sir.

11 MS. ZIMMERMAN: Your Honor, if we could, we do
12 have some questions just briefly with respect to procedures
13 in terms of how the Court would like to receive these. I
14 think it changes from MDL to MDL in terms of what the Court
15 would like. If you would like proposed orders submitted by
16 e-mail in chambers, which is what we have done thus far in
17 this MDL. If you would like something filed on the ECF
18 system, we can do that as well, and we just want to defer to
19 what your preference is.

20 THE COURT: The reason our local rules call for
21 e-mailing proposed orders as opposed to filing on ECF, I
22 think it's a good one, and I can't immediately think of any
23 reason that it wouldn't apply here. The basic reason is
24 that for people who go on ECF, there's a chance that they'd
25 be confused because they'd see something that says order,

1 and nothing has got a hard signature on it anyway.

2 So it's easier for public -- it's easier for the
3 public if there aren't things called "orders" on ECF that
4 aren't actually orders. So in other MDLs, what's the
5 reasoning behind filing the proposed orders on ECF?

6 MS. ZIMMERMAN: Your Honor, I wish I could speak
7 to that, but I know from a previous experience in the last
8 MDL across the river, we just e-mailed everything into the
9 Court chambers and wanted to make sure that that was your
10 preference before we did that.

11 THE COURT: Having been involved in writing our
12 local rule in that regard, I'm really kind of attached to
13 it.

14 MS. ZIMMERMAN: Excellent.

15 THE COURT: You were too.

16 MAGISTRATE NOEL: Yes, indeed. It's a good rule.

17 THE COURT: And that was our reasoning, wasn't it?

18 MAGISTRATE NOEL: That is the reasoning. We
19 didn't want a proposed order thinking that it's an order
20 when it's just not.

21 THE COURT: Right. All right, and I have some
22 confidentiality orders. I think that point number 6 we
23 might have, but we will be discussing the ESI protocol, I
24 believe. And the official website, and we do have that.
25 The amended or supplemental agenda point has to do with the

1 ESI protocol. Discovery in Europe. All right. We consider
2 ourselves to be on notice that there will be discussion of
3 discovery in Europe.

4 MR. GORDON: Your Honor, if I may, before we leave
5 the ESI protocol. We did have a meet and confer as
6 indicated here, A very thorough and productive meet and
7 confer with defense yesterday. However, there are some
8 unresolved issues. My prediction is there will continue to
9 be unresolved issues next week, but we're going to try. I
10 don't want to presume failure, but we're not there yet, and
11 I would hope, and we've talked about this before, that we
12 could have the opportunity before May 19th to come back
13 before the Court for telephone or otherwise to address
14 those, and I think the defense is in agreement.

15 MR. BLACKWELL: Our thought would be that we could
16 find time, particularly for Judge Noel, we may have issues
17 on the discovery in Europe, which we want to get going right
18 away on, the ESI protocol, but we figured once we reach that
19 point of impasse, we might be able to contact Your Honor and
20 find a time.

21 MAGISTRATE NOEL: The only caution I would have is
22 all of next week, I think both Judge Ericksen and I are
23 going to be in, wait for it, Rodgers, Arkansas, for the
24 Eighth Circuit Judicial Conference.

25 THE COURT: Maybe they'd like to come down there.

1 MAGISTRATE NOEL: The following week I will be
2 available, but district judges -- are you going to Brainerd?
3 There's an in-court seminar that the judges are doing, but
4 I'm holding down the fort for criminal duty, so I am
5 available on Tuesday, Wednesday, Thursday, Friday. I'm not
6 here on Monday, the 9th, but I am here the rest of that
7 week, so.

8 MR. GORDON: So maybe the 11th or 12th, perhaps?

9 MR. BLACKWELL: To the extent we are here, it
10 would be that week anyway.

11 MAGISTRATE NOEL: Call my chambers, and I can
12 certainly make a decision if I am designated by the district
13 judge to do so.

14 THE COURT: All right. And I would like to
15 participate, and I'm happy to do so by telephone, even if
16 I'm down in Rodgers, Arkansas, I think I could break away.
17 When do you think these problems are going to crop up?

18 MR. HULSE: Your Honor, I think we've got a
19 productive discussion going, and I think it's possible by
20 the end of the week following next week we'll have pretty
21 concretely what the disagreements are and hopefully pretty
22 narrow. I think plaintiffs are probably right to predict
23 that there will be some disagreements, but given what ESI
24 protocols are like, I don't think it's in anybody's interest
25 to having the Court wade through it line by line when we

1 could take the time to reach agreement.

2 MR. GORDON: I might differ just a little bit --

3 THE COURT: Okay, just a second, I thought that
4 this ESI protocol business would be a little bit more of a
5 discussion, so I'm just running through the proposed agenda
6 right now, and then when we talk about how to resolve the
7 ESI issues, I want to have a little more sense of where you
8 are right now and what the general parameters are likely to
9 be with respect to the disagreements, so that when you call
10 or come in, we're not hit completely cold with that.

11 So if we could just get back to that after we
12 finish the agenda, which is basically over, because there's
13 the Med Watch reports matter.

14 So those are the items that are on the agenda. Is
15 there anything else that we're going have to cover or should
16 cover or you'd like to cover today while we're all together?

17 MR. GORDON: I don't think so, Your Honor, for the
18 plaintiffs.

19 THE COURT: Okay. Let's go through the things
20 that you agree on, if we could. I have the proposed
21 pretrial order about direct filing. I didn't have any
22 problem with that. Is that a joint proposal?

23 MS. YOUNG: Yes, Your Honor.

24 THE COURT: Okay. That looked good to me.

25 The E-Service proposal also. Nothing jumped out

1 at me as being problematic. That's a joint proposal as
2 well?

3 MR. BLACKWELL: Yes, Your Honor.

4 THE COURT: All right. Now, the protective order
5 seemed all right. I didn't like the use of the word
6 "strictly" with "strictly construed wherever possible." And
7 that is in paragraph 1, the scope. It says, "as there is a
8 presumption in favor of open and public judicial proceedings
9 in Federal Court, this order will be strictly construed in
10 favor of public disclosure and open proceedings wherever
11 possible." I have no quarrel with the concept. It's just
12 that "strict construction" has its own --

13 MR. HULSE: Your Honor, we certainly have no great
14 attachment to the word "strictly". We're fine with it being
15 stricken.

16 MR. GORDON: "Just construed" is fine with us,
17 Your Honor.

18 THE COURT: Holley, we can make that change,
19 right? Okay. All right. So the protective order seems
20 fine.

21 And thank you very much, everyone, for your
22 revised introduction for the website. Short, clean, clear.
23 Looked really good.

24 The master short and long forms for the
25 complaints, I don't think that -- I couldn't tell if those

1 are joint submissions or if they are just from plaintiff.

2 Mr. Blackwell?

3 MR. BLACKWELL: Your Honor, if I may, we just
4 received that this morning, so I haven't even seen it yet.
5 So I know it's there, and we'd like a chance to see if
6 there's anything that we'd like to talk about with respect
7 to it.

8 THE COURT: You know, what I learned in law school
9 is sign it without reading it.

10 (Laughter.)

11 THE COURT: But if you want to read it first.

12 MR. BLACKWELL: I'll read it, Your Honor. Only my
13 clients tell me to sign it without reading it.

14 MR. GORDON: Your Honor, I would only say that
15 these are plaintiff's complaints. There's no representation
16 that they're joint. I'm sure they'll have things they don't
17 like about them, but --

18 MR. BLACKWELL: Well, there's a proposed order
19 also, Your Honor, that has language in it that we'd like to
20 read to see what is proposed to the order with respect to
21 the complaint, and so we'd just like to read it.

22 MR. GORDON: Fair enough.

23 THE COURT: Right.

24 MR. GORDON: No objection to that.

25 MAGISTRATE NOEL: I'm in favor of lawyers reading

1 everything.

2 (Laughter.)

3 THE COURT: Just an informal either yes or no or
4 I guess an informal yes to chambers. And if there's any
5 sort of problem with the order, talk to Mr. Gordon, and let
6 us know if there's anything we need to do.

7 MR. BLACKWELL: I'll do that, Your Honor.

8 THE COURT: Okay, that sounds great. Now, talk
9 about the ESI. So Mr. Gordon?

10 MR. GORDON: Yes, Your Honor.

11 THE COURT: Talk to me about where you are on the
12 ESI protocols. What's going on? What do you anticipate?

13 MR. GORDON: Well, I'll tell you generally, Your
14 Honor, and, obviously, answer any questions you wish me to.
15 If we get too far down to the weeds on this, I might suggest
16 to Your Honor that you hear from Behram Parekh, the chair of
17 our ESI committee, because he's been more involved in the
18 minutia of the details than I have, but I was in a lengthy
19 meet and confer yesterday with Ben Hulse for the defense and
20 others. And I would say that while we had a bumpy road
21 initially, as we talked through things, we got a much better
22 sense of what has been done thus far by the defendants in
23 terms of the review and collection process, in terms of the
24 data sources that they have looked at for discoverable
25 information.

1 We have retained for the steering committee an
2 outside consultant, an ESI consultant who is very familiar
3 with the Sedona principles and the modern way of doing
4 e-discovery, which I know the Court is very familiar with.
5 And our concern in a nutshell, Your Honor, is that some of
6 what has been done to this point and, of course, I don't
7 want to prejudge it because we haven't seen what they intend
8 to produce with regard to our discovery requests, but may
9 not be from our point of view reasonably calculated to lead
10 to the full panoply of discovery information we think we're
11 entitled to.

12 THE COURT: And that was a nice pause there
13 recognizing the change to Rule 26.

14 MR. GORDON: Yes, Your Honor. And, obviously,
15 with the proportionality rules in place that occurred in
16 December, we're cognizant of the rules and the
17 interpretation of those rules, and we want the Court's input
18 on that, and we certainly want to be fair and reasonable and
19 not seek discovery of information that is superfluous or
20 inefficient and a waste of everyone's time.

21 That said, the discovery that I'm familiar with
22 from the predecessor cases, as co-counsel with Mr. Hodges
23 and Mr. Assaad from Walton & Johnson, is a word I've used
24 before here "anemic." I mean there is a lot of information
25 that we believe must exist in the form of e-mail servers and

1 other electronic data sources, that I believe Mr. Hulse has
2 given us very good indications, is robust, is
3 thorough-going, but exactly what the universe of documents
4 and the universe of ESI is, we don't know yet. We don't
5 have a really good understanding of how large this data
6 collection may be and whether or not it needs to be reviewed
7 sort of in a joint fashion, which we talked about, and may
8 be a company.

9 We've got an ESI company we're working with.
10 They've worked with others in the past, but I think what
11 we've talked about and what we're making progress on is the
12 idea that we might push the Court with a joint proposal to
13 do predictive coding.

14 Type of review once we fully understand what's
15 been done already and what the world or universe of
16 documents and the ESI data are.

17 Now, are we going to be able to agree on
18 everything? Are we even going to be able to agree on a
19 joint, you know, company that we would share the expense of
20 to promote efficiency? I'm not sure yet. I think that's
21 part of what we really want to explore next Wednesday in an
22 in person meet and confer. And depending on how that goes,
23 I think our prediction is there will be lingering issues
24 that we would want to come back to the Court with the
25 following week if Judge Noel is back and Your Honor is able

1 to dial in that. That would be kind of my general synopsis.

2 THE COURT: But you are meeting in person next
3 Wednesday?

4 MR. GORDON: Yes, Your Honor.

5 MR. HULSE: That's correct, Your Honor.

6 THE COURT: Here?

7 MR. HULSE: Yes.

8 THE COURT: Okay, Mr. Hulse, what do you --

9 MR. HULSE: Yeah, just a few more things, I should
10 say initially that we, of course, dispute that there was an
11 "anemic" production using Mr. Gordon's word. There was a
12 production that was appropriate for those cases. We've got
13 a lot more cases, and we've got more issues implicated here.

14 We started out with competing ESI protocols and
15 certainly from our perspective what they proposed to us was
16 kind of a plaintiff's wish list dream protocol. I'm sure
17 they had a similar reaction to ours.

18 Our proposal to them was to follow the ESI
19 protocol that Judge Nelson adopted in the NHL MDL, which was
20 a kind of a middle of the road sort of thing. But it's
21 plaintiff's desire to really get down to the nitty gritty in
22 the protocol rather than having the protocol create a
23 framework for settling some of these individual issues. And
24 that's fine, but it just means that it takes us a little bit
25 longer to get to a proposed order.

1 The other thing too is they are very eager to
2 explore something that is still pretty rare today, which is
3 collaborative predictive coding. And it's something that we
4 actually did not anticipate that they would be so interested
5 in doing, so we're exploring that and seeing if we can find
6 a way to make that happen, but that is still a very unusual
7 thing to do today. Maybe it will be more typical in the
8 future, but to the extent we're doing it, it really is going
9 to require a lot of work and engagement from the Court to
10 figure out a way to do it that doesn't abridge the
11 defendant's confidentiality and privilege, which is always
12 the risk of these things.

13 (Whereupon, Judge Ericksen and Magistrate Judge
14 Noel have a private discussion off the record.)

15 (In open court.)

16 MR. HULSE: A couple things I would add is that
17 this is not -- the discovery is progressing, nonetheless,
18 there is certainly discovery that we can do without
19 agreement on the ESI protocol. Plaintiff served us about
20 250 requests for production last month, and we're going to
21 be responding to those. We're going to be making
22 productions of things that we can produce without agreement
23 on key words and custodians and that sort of thing, but it's
24 still, of course, our desire to reach agreement on key words
25 and custodians because that's what will avoid the fights

1 down the line.

2 THE COURT: Do you have an ESI consultant?

3 MR. HULSE: Well 3M actually has very robust
4 internal resources on this that they've developed over the
5 years too, but we do work with consultants as well.

6 THE COURT: Is there a chance that you and the
7 plaintiffs could agree on a consultant bearing in mind that
8 maybe, I don't know, maybe your percentage would be less
9 because you would provide more in-house?

10 MR. HULSE: I think that's precisely the sort of
11 thing that we're going to be discussing and striving towards
12 because in order to do the collaborative predictive coding,
13 that would be a necessary step. And the plaintiffs have
14 been very open to that discussion that we've been having
15 over the last few days.

16 MAGISTRATE NOEL: Let me ask you this because
17 between the lines of what Mr. Gordon was saying, it sounded
18 like there was some suggestion that maybe after discovery
19 begins, there may be some need to tweak the ESI protocol.
20 Is that something that's the topic of conversation in your
21 Wednesday meeting?

22 MR. HULSE: Very much, Your Honor, the approach
23 that we've suggested, for one thing, there is a production
24 set from the Walton and Johnson cases. With the entry now
25 of the protective order, everybody, all the plaintiff's

1 counsel will have access to it. And our suggestion had been
2 that plaintiffs should get their arms around that and use
3 that set to help them develop their list of additional
4 custodians beyond the ones that we've already suggested to
5 them. In fact, the whole approach that we suggested was a
6 key words and custodians using that set as a starting point.
7 But no matter what, it's going to have to be iterative. And
8 what we've proposed to them is we keep coming back over the
9 course of the case. And, of course, we've got a general
10 causation focus right now. Everybody is given priority to
11 that. As we get to other issues in the case, then there may
12 be additional custodians that we want to get and additional
13 data sources at that point. So in an MDL situation like
14 this, it's got to be iterative or it can't work.

15 THE COURT: So, so far what are the data sources
16 so far that --

17 MR. HULSE: Right, so we have individual
18 custodians.

19 THE COURT: Like where are they? How many?

20 MR. HULSE: Three. So we have proposed a set of
21 custodians who are the key people in research and
22 development to start out with because of the general
23 causation focus, asked plaintiff to propose additional
24 custodians too. That and then, you know, we've got
25 regulatory documents. We have testing documents, and so

1 forth. These are all the primarily sources in the first
2 instance of documents that would be responsive to these
3 requests that are focused on general causation.

4 But I also want to be clear that we are not -- our
5 approach to discovery is not to say we are only responding
6 to general causation discovery. We understand that the
7 Court hasn't limited discovery that way at this point. It's
8 a matter of prioritizing given that we have some deadlines
9 that we need to meet.

10 THE COURT: Okay.

11 MR. HULSE: Like I said, I think we've sort of
12 reached a turning point in the discussion where we've gone
13 from our polar opposite ESI protocols to try and see if we
14 can find a way to make this collaborative predictive coding
15 work. But it is, like I said, still a pretty unusual thing
16 to do today.

17 THE COURT: But you are proceeding with electronic
18 discovery even in the absence of a formal ESI protocol.

19 MR. HULSE: That's right, for the sources that
20 don't require, you know, the application of key words or
21 predictive coding. There are things like, you know, 510K
22 submissions, regulatory submissions. They're getting
23 produced no matter what regardless of key word or custodial
24 identification.

25 THE COURT: But you're not doing any searching

1 within the sources?

2 MR. HULSE: We have done that in the past. And
3 the prior production in Johnson and Walton do reflect that
4 kind of effort, but we, of course, would prefer not to have
5 to do it twice. I'm sure that if we applied our own set of
6 key words to the documents that we have right now, the
7 plaintiffs would probably think they were insufficient. So
8 it's in everybody's interest to get agreement on that if we
9 can.

10 THE COURT: Well, and that would be an advantage
11 of having a joint ESI consultant, I suppose.

12 MR. HULSE: Certainly, if we can reach agreement
13 there.

14 THE COURT: Mr. Gordon, could we hear from your
15 technology person?

16 MR. GORDON: Yes, Your Honor, of course. And I
17 think Mr. Ciresi would like to be heard as well. Mr. Parekh
18 can address this in more substance, but I would say just in
19 complete agreement and touching on the Court's points very
20 briefly as Mr. Ciresi and Mr. Parekh come up, that is really
21 the heart of the issue is what's been done so far and what
22 needs to be done in hopefully a collaborative way.

23 So if you look, for example, at what they've done
24 so far on the Walton and Johnson production, they candidly
25 told us that a list of key words was used. And after these

1 key words were applied, key words that we didn't have any
2 input on, predictive coding was done to that. So the
3 universe as they know it gets culled down even more
4 before --

5 THE COURT: Yeah, let me hear from Mr. Parekh.

6 MR. GORDON: And by the way --

7 THE COURT: Yeah, I know --

8 MR. GORDON: -- that's not accurate.

9 THE COURT: I know. Mr. Parekh?

10 MR. PAREKH: Good morning.

11 THE COURT: How's it going on the ESI?

12 MR. PAREKH: I think we're making a lot of
13 progress compared to where we were a week ago where we were
14 sort of like we're over here and they're over here and never
15 the twain shall meet.

16 We've been trying to explore the possibility of
17 cooperative predictive coding, which in my view is sort of
18 the next step that litigation is going to take. And we see
19 it a lot in patent cases. We see it a lot in technology
20 cases out in California. It's just not something that's
21 really been done in drug liability MDL-type litigation to
22 this point.

23 THE COURT: Tell me about it. How does it work?

24 MR. PAREKH: So what it does is you have two
25 people from plaintiff's side or one person from plaintiff's

1 side and one person from defendant's side, and you do a
2 statistical sampling of the overall universe of documents,
3 about a thousand or so is considered a good statistical
4 sample. And you both sit down in a room together, and you
5 go through those documents. And you go relevant, not
6 relevant, relevant, not relevant. If for some reason you
7 can't come to an agreement, you put those to the side for
8 the moment.

9 You go through this iterative process through that
10 entire set. Whatever is left that's relevant versus not
11 relevant gets then fed into the computer system, and says,
12 okay, these are the things that we're looking for and these
13 are the things that the computer system should prioritize.
14 Here are the things that we aren't looking for, and these
15 are the ones that they should discard.

16 The computer system then goes through the entire
17 set of documents that's been collected and links them and
18 says these documents are, you know, a hundred percent
19 brilliant matches to the relevant documents. These are 80
20 percent matches. These are 60 percent matches, and it ranks
21 those documents in order.

22 You then come up with between the two parties
23 what's called a precision number, which is how narrowly
24 tailored you want those documents to be to your seed set,
25 and then you come up with a checking mechanism, which is you

1 go through and do a statistical sample of the documents that
2 the computer discarded and said they were 50 percent or
3 below, and you see whether or not, you know, in that sample
4 there actually were documents that should have been
5 included. Hopefully, you're right on the first time, and
6 there aren't any, and you move on and then you just do a
7 production. If there were some, then you do this iterated
8 process again and run it through again.

9 It usually, it's, you know, usually takes about a
10 week or so before you get a final agreed upon set. And then
11 you say, okay, produce to us every document that hits an 80
12 percent threshold and above. That's the way it works.

13 THE COURT: So you have to agree on the initial
14 universe, right?

15 MR. PAREKH: Correct.

16 THE COURT: And how are you doing on that?

17 MR. PAREKH: Well, right now we're still
18 discussing whether or not we're even going to use this
19 process.

20 THE COURT: What else would you use? Just kind of
21 people get together and figure out what the --

22 MR. PAREKH: The old version is you agree on a set
23 of key words. You run the key words through an engine and
24 then whatever it spits out, then you do a manual review on
25 those.

1 THE COURT: So then you do the quality control and
2 you adjust as you go forward?

3 MR. PAREKH: Right, exactly. What we've found in,
4 you know, more complicated technology-related litigation is
5 that the predictive coding model provides a much better set
6 of documents for both sides and actually narrows the number
7 of documents that people have to manually review, which is
8 why we think it's a better system, and it allows the sides
9 to work cooperatively in order to get these documents.

10 Especially from the plaintiff's side, a lot of
11 times with key word searching, you don't know what you don't
12 know. And so the internal name, you know, nickname for a
13 particular item could have been, you know, BH, or in -- I
14 can't remember the litigation. There's a real estate
15 litigation recently where the securities and questions were
16 called "poopies." Who would have thought, right? It's just
17 not something that was considered. And plaintiffs didn't
18 know and then they ran across one document and went, oh.
19 And then when we did the search on that, we got thousands
20 and thousands of documents that were now relevant to the
21 word "poopies."

22 THE COURT: Here's what it sounds to me. And I
23 realize now that I forgot that it was called "predictive
24 coding," but we did get trained on this. So I learned how
25 to do it, but what it is, and where the pressure points are,

1 et cetera.

2 So it's another way to try to get to the same
3 place as the key word searches, because I don't know in the
4 real estate case whether the word was discovered as part of
5 the predictive coding or quality control and a word search.
6 Either way you get to the same place.

7 So some people, as far as I heard when I was being
8 educated on it, some people think that the predictive coding
9 works better, and it's cheaper because more can be done in
10 an automated way. And some people point to statistics
11 showing that that's not necessarily true and that the
12 quality of the hand review or the quality of the people
13 either way makes more difference than anything else.

14 So they're all different ways of trying to get at
15 the same thing, but it's not a whole new world. Predictive
16 coding is not some brand new completely different idea.

17 MAGISTRATE NOEL: But I think the newness here is
18 their attempt to collaborate and come up with a joint
19 predictive coding process that not just the defendants are
20 using, but that they both agreed here's what we're going to
21 do. And you all want to be on the cutting edge of
22 litigation science, so go forth.

23 MR. HULSE: Yes, as they mentioned, 3M used
24 predictive coding for Walton and Johnson because it is
25 working -- it's developing the right key words can be

1 difficult. The initial key words that the company came up
2 with, which have been shared with plaintiff's counsel, had a
3 50 percent hit rate on the electronic documents and that's
4 just not workable.

5 THE COURT: It's not good enough.

6 MR. HULSE: So you got two things you can do is
7 really work hard to develop some key words and search
8 strengths that are more targeted, which can very difficult
9 to do across the V or make use of the predictive coding.
10 What's tended to stop the collaboration is that the other
11 side gets access to a pre-review set. Okay. And you make
12 provisions for pulling out privilege documents in advance,
13 but still it's not the same as manually gone through it
14 before. And so that's really what tends to lead to the
15 concerns and, ultimately, in many cases I think the
16 breakdown of this discussion. But, you know, we appreciate
17 the sophistication of plaintiffs (inaudible) on this issue.
18 Mr. Parekh, in particular, so we're going to see if we can
19 take a run at this.

20 THE COURT: So at the point that the pre-review
21 becomes problematic, and, of course, you've got 502, and
22 you've got the changes to the civil rules that are all
23 designed to try to make that not be a stick in the spokes of
24 your process. It would be helpful possibly to have quick
25 access to the Court during that at that time?

1 MR. HULSE: I think that would be the key, if we
2 go down this path, yes.

3 MR. PAREKH: Absolutely.

4 MR. GORDON: Hundred percent agree.

5 THE COURT: It all sounds very --

6 MAGISTRATE NOEL: Cutting edge.

7 THE COURT: And it all makes sense, doesn't it?

8 MAGISTRATE NOEL: Yes.

9 MR. HULSE: Like I said, we're going to see if we
10 can take a run at it, but it's absolutely possible despite
11 that there is no way that we may not be able to reach it
12 just in the same way. Many have tried and not managed to
13 reach agreement, but there's always keywords and custodians,
14 if we don't make this approach work.

15 THE COURT: Okay. So they're talking about next
16 week.

17 MAGISTRATE NOEL: They're meeting on Wednesday,
18 the fourth.

19 THE COURT: All right. I am coming back from
20 Arkansas on the fourth. And I get in at 1:30 in the
21 afternoon, so if you needed anything in the afternoon, I'm
22 leaving the conference early. I'll be here on Thursday the
23 fifth; and Friday the sixth.

24 MR. HULSE: I would anticipate probably the
25 following week would be the more likely time for engaging

1 the Court on this.

2 THE COURT: And the reason I'm looking is that I
3 think some of those -- there's really nothing about the
4 bench conference up in wherever it is that would inhibit
5 discussion about this, except actually especially the
6 morning of that Friday will be an active meeting, and I
7 would not be able to do anything that morning because of the
8 bench meeting, but --

9 MS. ZIMMERMAN: The 13th, Your Honor?

10 THE COURT: Friday the 13th. I was trying all
11 kinds of ways not to call it Friday the 13th.

12 MR. PAREKH: Would Thursday the 12th work?

13 THE COURT: Thursday is the 12th.

14 MR. PAREKH: Would that work? Maybe we can set
15 something up.

16 THE COURT: If you are going to set something up,
17 why don't you set it up for Wednesday the 11th, and then
18 it's less --

19 MR. PAREKH: I'm in an all day mediation in San
20 Francisco, and it's just very hard for me to get here from
21 that by Wednesday just because of the way the flights work.

22 THE COURT: You're talking about you will be here
23 personally.

24 MR. HULSE: We can do that on the phone I think.
25 I would suggest that we confer and maybe talk to Cathy, and

1 we can circle back quickly.

2 MR. GORDON: Your Honor, I might interject that as
3 Judge Noel may be aware, I think we're going to have a
4 hearing across the river on the 11th already in another MDL
5 matter I believe that's going to happen, and so it might be
6 better on the 12th, if that works for everyone else.

7 MR. HULSE: Frankly, I couldn't say yet, Your
8 Honor. I haven't checked my schedule.

9 THE COURT: All right. Well, Judge Noel will be
10 here on the 12th, and I will take some sort of a break and
11 listen in because I think this is a really interesting
12 topic. I don't want to be left in the dust. All right. So
13 seems like a plan. That's great.

14 MR. PAREKH: Thank you.

15 MR. HULSE: Thank you.

16 MR. GORDON: Thank you, Your Honor.

17 THE COURT: Okay. Mr. Ciresi, did you want to
18 talk about ESI or anything?

19 MR. CIRESI: I think you covered most of it, Your
20 Honor. I just, a couple of the comments that Your Honor
21 made and that Mr. Hulse made I think sort of point to what
22 the issue is here, and that is he mentioned that there is a
23 production set already produced, but they had to come from
24 some universe of documents.

25 And I think that's the key is what is the universe

1 of documents that has been cataloged by these robust
2 internal resources of 3M? Because as far as I can tell,
3 based on our work at our firm to this date, they had five
4 people that they identified as custodians. And Ms. Conlin
5 and I have been through some depositions and documents, and
6 we've already identified 40 potential custodians.

7 So if the parties can arrive at what is this
8 universe that you have, then we can get to where you use
9 these algorithms and predictive abilities to say what within
10 that universe is needed, and I think that's where the
11 discussion should focus.

12 And as far as I can tell, that whole index, which
13 I assume they have because in other cases, and one that
14 really comes to mind to me is we went through nine orders of
15 the Court to get to what even the word "index" was, and
16 we're not going to do that here. I understand that, Your
17 Honor. But if we can at the outset find out what that
18 universe is that 3M has, I think that will go a long way to
19 expediting how we apply the ESI protocols and how we get to
20 proportionality. So that's all I wanted to say.

21 MR. HULSE: Your Honor, briefly, the number of
22 considerations is simply not --

23 THE COURT: This is all something that you're
24 going to work on. The identification of the universe is
25 always the first big step, and you're on it. There's

1 nothing I can do to be of help at this point. So just step
2 back, right? Step away.

3 All right. That's all helpful. I think we're to
4 the end of what we can accomplish.

5 MR. GORDON: Nothing further from the plaintiffs,
6 Your Honor.

7 MR. BLACKWELL: We're good also, Your Honor.

8 THE COURT: Well, pleasure to see everybody.

9 MR. GORDON: Thank you, Your Honor.

10 MR. BLACKWELL: Thank you, Your Honor.

11 THE COURT: And thanks again for all the
12 submissions of yesterday. I'll look forward to hearing
13 hopefully from you, Mr. Blackwell, that you don't have any
14 problem with the other. Otherwise, I'll hear from the two
15 of you about what, if anything, on the complaints.

16 MR. GORDON: And I do have one last question. I
17 forgot, Your Honor. We addressed this, I think, with the
18 Court indirectly by e-mail. In terms of witnesses for
19 science day, is the Court okay with three?

20 THE COURT: It's your number of hours.

21 MR. GORDON: Okay. We wanted to make sure, Your
22 Honor.

23 THE COURT: That's it for me. Anything else from
24 you?

25 MAGISTRATE NOEL: No, I'm good.

1 THE COURT: All right. Great.

2 (Court adjourned at 11:03 a.m.)

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5
6 I, Maria V. Weinbeck, certify that the foregoing is
7 a correct transcript from the record of proceedings in the
8 above-entitled matter.

9 Certified by: s/ Maria V. Weinbeck

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